No. 79-563

In the Supreme Court of the United States

OCTOBER TERM, 1979

FREDERICK LIOSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. 2-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1979. The petition for a writ of certiorari was filed on October 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of tape-recorded conversations between petitioner and his co-defendants, concerning their conspiracy but occurring after its completion, requires reversal of petitioner's conviction.

2. Whether venue was properly laid in the Western District of Pennsylvania.

3. Whether the district court committed reversible error in instructing the jury that petitioner could be convicted both for theft and for receiving stolen property.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count 1), theft of property from interstate commerce, in violation of 18 U.S.C. 659 and 2 (Count 2), and receiving stolen property, in violation of 18 U.S.C. 659 and 2 (Count 3). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. 2-4).

The evidence at trial showed that Sea-Cold Service, Inc., had arranged for 30,000 pounds of shrimp, worth approximately $106,000, to be transported by truck from Louisiana to Massachusetts in October 1975. The trucking firm used to transport the shrimp was owned by co-defendant Everett Bonds (Tr. 116-117). On October 17, 1975, Bonds drove the tractor trailer with the shrimp to Cleveland, Ohio, where he unloaded it. Later Bonds instructed one of his employees, co-defendant John Esposito, to travel to Pennsylvania and report to the Pennsylvania State Police that the shipment had been hijacked in that State. Esposito was driven to Pennsylvania and was left on the side of the road with his hands and feet taped. Esposito filed the false hijacking report with the Pennsylvania State police (Tr. 325-337).

Thereafter, the conspirators contacted Ray Robbins and asked him if he was interested in buying 12,000 pounds of shrimp. Robbins made arrangements to purchase the shrimp and rented a truck in Cincinnati. Robbins met petitioner and co-defendant Alex Calarco in Cleveland and the three drove to the warehouse where the shrimp were stored. The three men waited at a restaurant while the shrimp were loaded on the truck. Petitioner telephoned the warehouse to check on the loading operation.

Robbins subsequently delivered the shrimp to buyers in Chicago. He returned to Cleveland and paid petitioner and Calarco $21,000 in cash. Robbins later made arrangements to pick up a second load of shrimp. Once again, Robbins paid petitioner and Calarco after delivering the stolen shrimp to buyers (Tr. 489-533).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court erred in admitting into evidence certain tape recordings of telephone conversations involving the conspirators other than petitioner and their buyer, Ray Robbins, which took place early in 1978. He maintains that while the conversations would have been admissible under the co-conspirator exception to the hearsay rule had they taken place during the conspiracy, they could not be admitted under present circumstances because they occurred after termination of the conspiracy. But even assuming that the tape recordings should have been excluded as hearsay, any error in admitting them was wholly harmless.

Robbins, a central figure in the conspiracy, testified extensively about the actions and statements of each of the defendants and their role in the crime. The tape recordings were admitted merely as corroboration of the testimony given by Robbins in court. In ruling on the admissibility of the tapes, the district court correctly observed (Tr. 560):

> The tapes are nothing but corroboration of the truth of the witness Robbins' statement. At least, that is what they are being offered for. The co-conspirator Robbins has implicated all the defendants. He has already stated what they did, what they said, where they went, their acts and their statements.

Moreover, since Robbins testified at trial, he was subject to complete cross examination with respect to the truth of his trial testimony and of his recorded statements to the same effect. See *California* v. *Green*, 399 U.S. 149, 159-164 (1970) ("the inability to cross examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial"). Since Robbins' trial testimony and his prior recorded statements were consistent, the out-of-court declaration did not raise additional issues of credibility or reliability. Under these circumstances, petitioner was not harmed by admission of the cumulative evidence even if it was hearsay.

2. There is no merit to petitioner's claim (Pet. 12-16) that venue was improperly laid in Pennsylvania. As the district court expressly found (Tr. 77-78), the concealment activities occurring in Pennsylvania were an integral part of the process of hijacking and receiving the

stolen cargo. Moreover, the conspiracy embraced the time period during which the false police report was filed in Pennsylvania. Filing the report in Pennsylvania was not a separate act of concealment; it was done in furtherance of the conspiracy to deflect the attention of the authorities and was a central part of the illegal venture. See 18 U.S.C. 3237(a); *Hyde* v. *United States*, 225 U.S. 347, 362-367 (1912).

3. Petitioner also claims (Pet. 17-20) that the trial court erred in refusing to instruct the jury that it could convict him of theft or of receiving stolen property, but not both. He argues that the jury may have improperly aggregated the evidence to convict him on both offenses when, if properly instructed, it might not have convicted him on both counts or might not have convicted him at all.

We agree that the court should have given the requested instruction. See *United States* v. *Gaddis*, 424 U.S. 544, 550 (1976). This error, however, does not require reversal when the instructions are considered as a whole. See *Cupp* v. *Naughten*, 414 U.S. 141, 145-146 (1974). The district court specifically instructed the jury that, in order to convict on any count, it must first find that all of the elements of the offense were proven beyond a reasonable doubt (Tr. 1146-1148). As Mr. Justice White pointed out in his concurring opinion in *Gaddis*, *supra*, 424 U.S. at 551-552:

> The verdict on the robbery count shows that the jury found each element of that offense to have been established beyond a reasonable doubt. That the jury went on to find that the defendant also possessed the proceeds of the robbery—whether on

> a different date and on different proof or not casts no doubt on the trustworthiness of the findings on the robbery count * * *. [T]he robbery count is untainted by the fact that in addition to its findings of guilty on that count the jury also made findings on the possession count, for those findings are factually consistent with the findings on the robbery count.

Since *Gaddis*, all of the courts of appeals to have faced this question have concluded, as did the court below, that a new trial is not required when the jury convicts a defendant both for robbery and for receipt of stolen goods. See *United States* v. *DiGeronimo*, 598 F. 2d 746, 753 (2d Cir. 1979); *United States* v. *Crawford*, 576 F. 2d 794, 800-801 (9th Cir.), cert. denied, 439 U.S. 851 (1978); *Proffitt* v. *United States*, 549 F. 2d 910, 912 (4th Cir. 1976), cert. denied, 429 U.S. 1076 (1977); *United States* v. *Sellers*, 547 F. 2d 785, 786 (4th Cir. 1976), cert. denied, 429 U.S. 1075 (1977); *United States* v. *Solimine*, 536 F. 2d 703, 711 (6th Cir. 1976), cert. denied, 430 U.S. 918 (1977). The court below was therefore correct in refusing to overturn petitioner's conviction based on this defect in the instructions.[1]

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[1]Although there is little practical reason for seeking vacation of one of petitioner's concurrent sentences for theft and receipt of stolen goods (*Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973)), petitioner is free to pursue that relief in the district court under Fed. R. Crim. P. 35. See *United States* v. *Gaddis*, *supra*, 424 U.S. at 549 n.12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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